

ESTTA Tracking number: **ESTTA243728**

Filing date: **10/20/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91186494
Party	Plaintiff Kraft Foods Global Brands LLC
Correspondence Address	Kraft Foods Global Brands LLC Three Lakes DriveNF-577 Northfield, IL 60093 UNITED STATES matthew.griffin@kraft.com, melissa.falk@kraft.com, cameishi.lindley@kraft.com
Submission	Motion to Strike
Filer's Name	Matthew A. Griffin
Filer's e-mail	matthew.griffin@kraft.com, melissa.falk@kraft.com, cameishi.lindley@kraft.com
Signature	/matthewagriffin/
Date	10/20/2008
Attachments	Motion to Strike Applicant's Affirmative Defenses.pdf (6 pages)(17788 bytes) Exhibit A.pdf (4 pages)(91432 bytes) Exhibit B.pdf (7 pages)(90626 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 77355857: KOOL
Published in the *Official Gazette* of July 22, 2008, in International Class 32

KRAFT FOODS GLOBAL BRANDS LLC,

Opposer,

v.

ANTHONY BROWN,

Applicant.

Opp. No. 91186494

MOTION TO STRIKE APPLICANT’S AFFIRMATIVE DEFENSES

Kraft Foods Global Brands LLC (“Opposer” or “Kraft”), moves to strike Anthony Brown’s (“Applicant’s”) so-called affirmative defenses as legally insufficient and redundant, pursuant to Fed.R.Civ.P. 12(f) and TBMP 506.

ANALYSIS

1. Applicant’s First Affirmative Defense Should be Stricken Because the Notice of Opposition States a Legally Sufficient Claim.

Applicant’s First Affirmative Defense alleges that “the Notice of Opposition fails to state a claim upon which relief can be granted.” (Defendant’s Answer, attached as Exhibit A, Par. 9). If an opposer establishes that it can withstand a motion to dismiss for failure to state a claim upon which relief can be granted, the Board will strike that affirmative defense. *Order of the Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 U.S.P.Q.2d 1221 (T.T.A.B. 1995). To withstand such a motion to dismiss, “an opposer need only allege such facts as would, if proved, establish that (1) the opposer has standing to maintain the proceeding, and (2) a valid ground exists for opposing registration.” *Id.*; TBMP 503.02. “For purposes of determining a motion to dismiss for

failure to state a claim upon which relief can be granted, all of opposer's well-pleaded allegations must be accepted as true, and the notice of opposition must be construed in the light most favorable to opposer." *Id.* Here, Kraft has alleged facts that establish both its standing and its valid ground for opposition.

a. Kraft Has Alleged Facts Supporting its Standing.

To establish standing, opposer need merely allege that it has "a real interest" in the opposition and a "reasonable basis for its belief of damage." *Ritchie v. Simpson*, 170 F.3d 1092 (Fed. Cir. 1999). "A real interest in the proceeding and a reasonable belief of damage may be found, for example, where plaintiff pleads...a claim of likelihood of confusion." TBMP 309.03(b). Kraft alleges in Paragraph 8 of its Notice of Opposition, attached as Exhibit B, that "Applicant's use of the mark KOOL for carbonated beverages is likely to result in confusion, mistake or deception with Opposer's KOOL-AID mark, or in the belief that Applicant or its KOOL products are in some way connected with, or licensed or approved by, Opposer." Under TBMP 309.03(b) and the cases cited therein, this allegation is sufficient to establish Kraft's standing in this opposition.

b. Kraft Has Alleged Facts Supporting its Ground for Opposition.

An allegation of a likelihood of confusion under Section 2(d) is a proper ground for opposing an application. 15 U.S.C. § 1052(d); TBMP 309.03(c). To properly plead likelihood of confusion, an opposer must allege (a) priority of use; and (b) likelihood of confusion. TBMP 309.03(c).

Kraft alleged that its use of the KOOL-AID trademark date to "at least as early as August 1927." (Notice of Opposition, Par. 1). Kraft further alleged that "upon information and belief, Applicant has no basis for claiming rights in the KOOL mark

prior to Opposer's first use of its KOOL-AID mark." (Notice of Opposition, Par. 6).

Accordingly, Kraft has alleged its priority over Applicant. As already discussed, Kraft also alleged likelihood of confusion in Paragraph 8 ("Applicant's use of the mark KOOL for carbonated beverages is likely to result in confusion, mistake or deception with Opposer's KOOL-AID mark, or in the belief that Applicant or its KOOL products are in some way connected with, or licensed or approved by, Opposer"). Thus, Kraft has properly pleaded its ground for opposing Applicant's application. Accordingly, the Board should strike Applicant's First Affirmative Defense, just as it did in *Order of the Sons of Italy in America*.

2. Applicant's Second, Third, and Fourth Affirmative Defenses Should Be Stricken as Redundant of Applicant's Denials.

When affirmative defenses merely "reaffirm applicant's previous denial of opposer's claim of likelihood of confusion and otherwise add nothing of substance," that affirmative defense will be stricken as redundant and improperly pleaded. *Textron, Inc. v. The Gillette Company*, 180 U.S.P.Q. 152 (T.T.A.B. 1973); see also *Order of the Sons of Italy in America*, 36 U.S.P.Q.2d 1221 (T.T.A.B. 1995). Here, Applicant's Second, Third, and Fourth Affirmative Defenses merely repeat, in multiple ways, the Answer's denial of Kraft's allegation of likelihood of confusion.

Paragraph 8 of the Notice of Opposition alleges that "Applicant's use of the mark KOOL for carbonated beverages is likely to result in confusion, mistake or deception with Opposer's KOOL-AID mark, or in the belief that Applicant or its KOOL products are in some way connected with, or licensed or approved by, Opposer." (Notice of Opposition, Par. 8). In its Answer, Applicant "denies the allegations contained in Paragraph 8." (Answer, Par. 8).

Yet the Second, Third, and Fourth Affirmative Defenses merely repeat this denial: “There is no likelihood of confusion between the marks of the Opposer upon which Opposer bases this opposition as identified in the Notice of Opposition and Applicant’s Mark” (Second Affirmative Defense); Applicant’s use of its mark will not mistakenly be thought by the public to derive from the same source as Opposer’s goods, now will such use be thought by the public to be a use by Opposer or with Opposer’s authorization or approval” (Third Affirmative Defense); and “Applicant’s mark, when used in connection with Applicant’s goods, is not likely to cause confusion, or cause mistake, or to deceive as to the affiliation, connection or association of Applicant with Opposer, or as to the origin, sponsorship, or approval of Applicant’s goods by Opposer” (Fourth Affirmative Defense).

Because these affirmative defenses add nothing of substance beyond what is already conveyed by the Applicant’s denial of likelihood of confusion, Applicant’s Second, Third, and Fourth Affirmative Defenses should be stricken, under *Textron* and *Order of the Sons of Italy*.

CONCLUSION

For the reasons stated above, Opposer asks the Board to strike Applicant's First Affirmative defense as legally insufficient and to strike Applicant's Second, Third, and Fourth Affirmative Defenses as redundant of Applicant's denial of likelihood of confusion.

KRAFT FOODS GLOBAL BRANDS LLC

/matthewagriffin/

Matthew A. Griffin

Senior Counsel—Trademarks

Three Lakes Drive NF-577

Northfield, Illinois 60093

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address of record by First Class Mail today, October 20, 2008.

/matthewagriffin/

ESTTA Tracking number: **ESTTA239379**

Filing date: **09/29/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91186494
Party	Defendant Brown, Anthony
Correspondence Address	BROWN, ANTHONY 400 SW 25TH TER FT LAUDERDALE, FL 33312-1415 ablebody12@comcast.net
Submission	Answer
Filer's Name	Anthony Brown
Filer's e-mail	ablebody12@comcast.net
Signature	/Anthony Brown/
Date	09/29/2008
Attachments	koolanswer.pdf (3 pages)(88874 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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KRAFT FOODS GLOBAL BRANDS LLC,

Opposition No. 91186494

Opposer

v.

Application Serial No. 77/355857

ANTHONY BROWN,

Published in the Official Gazette on
July 22nd 2008

Applicant

MARK: KOOL

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ANSWER

Anthony Brown for its answer to the Opposition herein, responds as follows:

1. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1.
2. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2.
3. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3.
4. Applicant agrees with the allegations contained in Paragraph 4.
5. Applicant agrees with the allegations contained in Paragraph 5.
6. Denies the allegations contained in Paragraph 6.
7. Applicant agrees with the allegations contained in Paragraph 7.
8. Denies the allegations contained in Paragraph 8.

FIRST AFFIRMATIVE DEFENSE

9. The Notice of Opposition fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

10. There is no likelihood of confusion between the marks of the Opposer upon which Opposer bases this opposition as identified in the Notice of Opposition and Applicant's Mark.

THIRD AFFIRMATIVE DEFENSE

11. Applicant's use of its mark will not mistakenly be thought by the public to derive from the same source as Opposer's goods, nor will such use be thought by the public to be a use by Opposer or with Opposer's authorization or approval.

FOURTH AFFIRMATIVE DEFENSE

12. Applicant's mark, when used in connection with Applicant's goods, is not likely to cause confusion, or cause mistake, or to deceive as to the affiliation, connection, or association of Applicant with Opposer, or as to the origin, sponsorship, or approval of Applicant's goods by Opposer.
13. There may be additional affirmative defenses to the opposition alleged by Opposer that are currently unknown to Applicant. Applicant hereby reserves the right to amend this Answer to allege additional affirmative defenses in the event discovery or other information indicates they are appropriate.

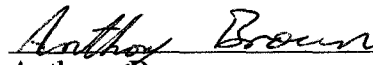
CONCLUSION

WHEREFORE, Anthony Brown. respectfully requests that the Opposer's Notice of

Opposition be dismissed with prejudice, that Applicant's KOOL mark be allowed to proceed to registration.

Dated September 25th 2008

Respectfully submitted,


Anthony Brown
400 SW 25th Terrace
Ft. Lauderdale, Fl. 33313

Representing Applicant, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September 2008, a true and correct copy of the foregoing NOTICE OF OPPOSITION ANSWER was served by placing the same in the United States Mail Box, First Class, postage prepaid and addressed to the following:

Kraft Foods Global Brands LLC
Att: Mr. Matthew Griffin
Three Lakes Drive NF-577
Northfield, IL 60093


Anthony Brown

Dated: September 25th 2008

ESTTA Tracking number: **ESTTA237553**Filing date: **09/18/2008**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Kraft Foods Global Brands LLC
Granted to Date of previous extension	09/20/2008
Address	Three Lakes DriveNF-577 Northfield, IL 60093 UNITED STATES

Correspondence information	Kraft Foods Global Brands LLC Three Lakes DriveNF-577 Northfield, IL 60093 UNITED STATES matthew.griffin@kraft.com, melissa.falk@kraft.com, cameishi.lindley@kraft.com
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Applicant Information

Application No	77355857	Publication date	07/22/2008
Opposition Filing Date	09/18/2008	Opposition Period Ends	09/20/2008
Applicant	Brown, Anthony 400 SW 25 Terrace Ft. Lauderdale, FL 33312 UNITED STATES		

Goods/Services Affected by Opposition

Class 032. All goods and services in the class are opposed, namely: Non-alcoholic beverages, namely, carbonated beverages
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Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	2461551	Application Date	04/13/2000
Registration Date	06/19/2001	Foreign Priority Date	NONE
Word Mark	KOOL POINTS		
Design Mark			
Description of Mark	NONE		

Goods/Services	Class 032. First use: First Use: 2000/03/01 First Use In Commerce: 2000/03/01 Beverages, namely, soft drinks; soft drink mixes, powders, syrups or concentrates for use in making soft drinks		
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U.S. Registration No.	2330153	Application Date	10/03/1997
Registration Date	03/14/2000	Foreign Priority Date	NONE
Word Mark	KOOL-POPS		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1998/01/01 First Use In Commerce: 1998/01/01 ready-to-freeze flavored liquid sold in packages for making frozen pops		

U.S. Registration No.	317955	Application Date	06/09/1934
Registration Date	10/09/1934	Foreign Priority Date	NONE
Word Mark	KOOL-AID		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class U045 (International Class 030). First use: First Use: 1927/08/18 First Use In Commerce: 1927/08/18 PREPARED POWDER CONTAINING FLAVOR, FRUIT ACID, AND COLOR PUT UP IN A NUMBER OF FLAVORS FOR MAKING NONALCOHOLIC BEVERAGE IN THE HOME		

U.S. Registration No.	384244	Application Date	09/06/1940
Registration Date	01/07/1941	Foreign Priority Date	NONE
Word Mark	KOOL-AID		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class U045 (International Class 032). First use: First Use: 1940/04/11 First Use In Commerce: 1940/04/11 [Nonalcoholic, Noncereal, Maltless,] CARbonated Beverages[And Syrups and ExTRACTs for Making the Same]		

U.S. Registration No.	1133277	Application Date	10/16/1978
Registration Date	04/15/1980	Foreign Priority Date	NONE
Word Mark	KOOL-AID		
Design Mark			
Description of Mark	NONE		

Goods/Services	Class 032. First use: First Use: 1927/08/18 First Use In Commerce: 1927/08/18 POWDERS, SYRUPS AND CONCENTRATES USED IN THE PREPARATION OF SOFT DRINKS		
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U.S. Registration No.	1793253	Application Date	12/20/1991
Registration Date	09/14/1993	Foreign Priority Date	NONE
Word Mark	KOOL-AID BURSTS		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 1993/01/04 First Use In Commerce: 1993/01/04 soft drinks		

U.S. Registration No.	2097176	Application Date	07/08/1996
Registration Date	09/16/1997	Foreign Priority Date	NONE
Word Mark	KOOL-AID BURSTS		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 1992/09/00 First Use In Commerce: 1992/09/00 soft drinks and powders, syrups and concentrates for use in making soft drinks		

U.S. Registration No.	2321815	Application Date	04/02/1999
Registration Date	02/22/2000	Foreign Priority Date	NONE
Word Mark	KOOL-AID		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 1927/08/18 First Use In Commerce: 1927/08/18 Beverages, namely, soft drinks, soft drink mixes; powders, syrups or concentrates for making soft drinks		

U.S. Registration No.	3485670	Application Date	02/23/2007
Registration Date	08/12/2008	Foreign Priority Date	NONE
Word Mark	KOOL-AID BURSTIN' WATERS		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2008/01/01 First Use In Commerce: 2008/01/01 Flavored waters		

Attachments	76035266#TMSN.gif (1 page)(bytes) 75368014#TMSN.gif (1 page)(bytes) 71352502#TMSN.gif (1 page)(bytes) 71435727#TMSN.gif (1 page)(bytes) 73189601#TMSN.gif (1 page)(bytes) 75131706#TMSN.gif (1 page)(bytes) 75673999#TMSN.gif (1 page)(bytes) 77114663#TMSN.jpeg (1 page)(bytes) Notice of Opposition to KOOL 77355857.pdf (3 pages)(12575 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/matthewagriffin/
Name	Kraft Foods Global Brands LLC
Date	09/18/2008

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 77355857: KOOL
Published in the *Official Gazette* of July 22, 2008, in International Class 32

KRAFT FOODS GLOBAL BRANDS LLC,

Opposer,

v.

ANTHONY BROWN,

Applicant.

Opp. No. _____

NOTICE OF OPPOSITION

Kraft Foods Global Brands LLC (“Opposer”), a Delaware limited liability company located and doing business at Three Lakes Drive, Northfield, Illinois, believes it will be damaged by registration of the mark shown in Application Serial No. 77355857, and hereby opposes the same.

The grounds for the opposition are as follows:

1. Since at least as early as August 1927, Opposer, through its predecessors and related companies, has manufactured, advertised, and sold soft drinks, soft-drink mixes, and other beverages (“KOOL-AID Beverages”) under the trademark KOOL-AID.

2. Opposer has sold many millions of dollars worth of KOOL-AID Beverages under the KOOL-AID mark throughout the United States and has spent many millions of dollars advertising and promoting its KOOL-AID trademark for KOOL-AID Beverages throughout the United States.

3. By virtue of Opposer’s long use, extensive sales, advertising, and promotional efforts, Opposer owns a valuable goodwill symbolized by its KOOL-AID trademark.

Opposer acquired that goodwill long prior to the filing date of the application opposed herein.

4. Opposer owns numerous registrations for marks that incorporate a KOOL or KOOL-AID component, including:

Mark	Reg. No.	Goods
KOOL POINTS	2461551	“Beverages, namely, soft drinks; soft drink mixes, powders, syrups or concentrates for use in making soft drinks”
KOOL-POPS	2330153	“Ready-to-freeze flavored liquid sold in packages for making frozen pops”
KOOL-AID and Design	0317955	“Prepared powder containing flavor, fruit acid, and color put up in a number of flavors for making nonalcoholic beverage in the home”
KOOL-AID and Design	0384244	“Carbonated beverages”
KOOL-AID and Design	1133277	“Powders, syrups and concentrates used in the preparation of soft drinks”
KOOL-AID BURSTS	1793253	“Soft drinks.”
KOOL-AID BURSTS and Design	2097176	“Soft drinks and powders, syrups and concentrates for use in making soft drinks”
KOOL-AID	2321815	“Beverages, namely, soft drinks, soft drink mixes; powders, syrups or concentrates for making soft drinks”
KOOL-AID BURSTIN’ WATERS	3485670	“Flavored waters”

5. On December 19, 2007, Applicant filed an intent-to-use application to register KOOL for “non-alcoholic beverages, namely carbonated beverages,” Application Serial No. 77355857.

6. Upon information and belief, Applicant has no basis for claiming rights in the KOOL mark prior to Opposer’s first use of its KOOL-AID mark.

7. Applicant’s use of and application to register the mark KOOL is without Opposer’s consent.

8. Applicant's use of the mark KOOL for carbonated beverages is likely to result in confusion, mistake or deception with Opposer's KOOL-AID mark, or in the belief that Applicant or its KOOL products are in some way connected with, or licensed or approved by, Opposer.

WHEREFORE, registration by Applicant of KOOL for the goods stated in Application Serial No. 77355857 would be damaging to Opposer. Opposer respectfully asks the Board to sustain this opposition.